Hap Seng Consolidated Bhd v Darinsok bin Pangiran Apan & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-03(IM)-65–04 OF 2012 AND S-03(IM)-67–04 OF 2012
RAUS SHARIF PCA, CLEMENT SKINNER AND AZAHAR MOHAMED JJCA
8 NOVEMBER 2013

Civil Procedure — Striking out — Pleadings — Writ and statement of claim — Application after close of proceedings — Land dispute — Whether High Court had original jurisdiction to hear claim as dispute still pending before assistant collector of land revenue — Judicial commissioner heard preliminary objection to application for injunction and allowed it on ground that High Court had no jurisdiction to hear claim — Claim dismissed — Appeal to Federal Court successful after appeal to Court of Appeal failed — Whether judge was right in refusing striking out application — Whether there were merits in case — Whether action frivolous, vexatious or abuse of court process — Rules of the High Court 1980 O 18 r 19(1)

The two appeals in the present case arose from the decision of the High Court in dismissing the appellants' ('the defendants') appeals to the judge in chambers vide encls 87 and 92 against the decision of the deputy registrar. The deputy registrar dismissed the appellants' summons in chambers to strike out the respondents' ('the plaintiffs') pleadings ('striking out application'). The plaintiffs brought this representative action on their behalf and on behalf of the native communities whom were the residents, proprietors, occupiers, holders and claimants of lands ('the said land') vested with native title and/or native customary rights at the Tongod Region seeking seventeen declaratory and injunctive reliefs and damages against the defendants. After the close of pleadings, the first defendant applied vide summons in chambers ('encl 48') to strike out the plaintiffs' writ of summons and statement of claim ('pleadings') under O 18 r 19(1) of the Rules of the High Court 1980 ('RHC'). The second and third defendants also filed a similar application ('encl 58') to strike out the plaintiffs' pleadings under O 18 r 19(1) of the RHC. In applying to strike out the plaintiffs' claim, the defendants contended that the High Court had no original jurisdiction to hear the plaintiffs' claim as the dispute was still pending before the assistant collector of land revenue ('ACLR'). The deputy registrar dismissed both encls 48 and 58 and the defendants appealed to the judge in chambers in encls 87 and 92, respectively. Pending the appeal, the judicial commissioner ('JC') heard the defendants' preliminary objection to the plaintiffs' application for injunction and allowed it on the ground that the High Court had no jurisdiction to hear the plaintiffs' claim. As a result, the

plaintiffs' claim was accordingly dismissed and the plaintiffs appealed to the Court of Appeal but the appeal was dismissed. The plaintiffs proceeded to appeal to the Federal Court and the appeal was allowed. The Federal Court directed the High Court to hear encls 87 and 92. In consequence, the plaintiffs' suit was reinstated and remitted back to the High Court and the High Court heard encls 48 and 58 and dismissed the two appeals with costs. The issues before the present court were whether the judge was right in refusing the defendants striking out application; and whether there were merits in the plaintiffs' case and that the action was not frivolous, vexatious or an abuse of the process of the High Court.

Held, dismissing both the appeals with costs:

(1) It is trite law that the court hearing a striking out application would only strike out a writ and statement of claim when it was plainly obvious that the action could not be sustained and liable to be struck out pursuant to O 18 r 19 of the RHC under the various grounds set forth under limb (a), (b), (c), and (d) (see para 16).

(2) This was not a proper and fit case for the plaintiffs' pleadings to be struck out under O 18 r 19(1) of the RHC. The fact that the Federal Court had allowed the plaintiffs' earlier appeal against the decision of the Court of Appeal that the High Court should not have struck out the plaintiffs' claim based on the preliminary objections of defendant, was a clear indication that there were triable issues before the High Court which warranted a trial (see para 17).

(3) The issues raised in this appeal and the relief sought did not relate to jurisdiction of the court but concerned matters relating to the plaintiffs' constitutional and common law rights. Whether the plaintiffs succeeded or not was a matter to be tried by the trial judge who had to take into consideration of the decision of the Court of Appeal as well as the Federal Court. As such, the High Court judge was right in refusing the defendants striking out applications premised on his findings that there were triable issues in the plaintiffs' action. The affirmation by the Federal Court in the earlier appeal put the correctness and propriety of the High Court judge's decision beyond question. Thus, in the interest of justice it was only proper that all the issues raised in this appeal should be ventilated at the trial proper based on the evidence adduced by the parties. At the full trial, the defendants could still raise the issue of jurisdiction, which the trial court would have to decide on the submission on the point having regard to the factual matrix of this case (see para 17).

[Bahasa Malaysia summary

Dua rayuan dalam kes ini timbul daripada keputusan Mahkamah Tinggi yang menolak rayuan-rayuan perayu-perayu ('defendan-defendan') kepada hakim

dalam kamar melalui lampiran-lampiran 87 dan 92 terhadap keputusan timbalan pendaftar. Timbalan pendaftar telah menolak saman dalam kamar perayu-perayu untuk membatalkan pliding-pliding responden-responden ('plaintif-plaintif') ('permohonan pembatalan'). Plaintif-plaintif telah memulakan tindakan perwakilan ini bagi pihak komuniti anak watan yang merupakan penduduk, pemilik, tuan punya, pemegang dan penuntut tanah-tanah ('tanah tersebut') yang diberikan hak-hak adat anak watan dan/atau hak milik anak watan di Daerah Tongod memohon 17 relief-relief deklarasi dan injunksi dan ganti rugi terhadap defendan-defendan. Selepas penutup pliding-pliding tersebut, defendan pertama telah memohon melalui saman dalam kamar ('lampiran 48') untuk membatalkan writ saman dan penyataan tuntutan plaintif-plaintif ('pliding-pliding') di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Defendan-defendan kedua dan ketiga juga telah memfailkan permohonan sama ('lampiran 58') untuk membatalkan pliding-pliding plaintif-plaintif di bawah A 18 k 19(1) KMT. Dalam memohon untuk membatalkan tuntutan plaintif-plaintif, defendan-defendan berhujah bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa sedia ada untuk mendengar tuntutan plaintif-plaintif kerana pertikaian itu masih belum selesai di hadapan penolong pengutip hasil tanah ('PPHT'). Timbalan pendaftar telah menolak kedua-dua lampiran 48 dan lampiran 58 dan defendan-defendan merayu kepada mahkamah dalam kamar, masing-masing dalam lampiran-lampiran 87 dan 92. Sementara menunggu selesai rayuan, pesuruhjaya kehakiman ('PK') telah mendengar bantahan awal defendan-defendan terhadap permohonan plaintif-plaintif untuk injunksi dan membenarkannya atas alasan bahawa Mahkamah Tinggi tiada bidang kuasa untuk mendengar tuntutan plaintif-plaintif. Akibatnya, tuntutan plaintif-plaintif telah ditolak sewajarnya dan plaintif-plaintif telah merayu ke Mahkamah Rayuan tetapi rayuan itu telah ditolak. Plaintif-plaintif meneruskan rayuan ke Mahkamah Persekutuan dan rayuan itu telah dibenarkan. Mahkamah Persekutuan telah mengarahkan Mahkamah Tinggi untuk mendengar lampiran-lampiran 87 dan 92. Berikutan itu, guaman plaintif-plaintif telah dibuka semula dan dikembalikan ke Mahkamah Tinggi dan Mahkamah Tinggi telah mendengar lampiran-lampiran 48 dan 58 dan menolak dua rayuan itu dengan kos. Isu-isu di hadapan mahkamah ini adalah sama ada hakim wajar menolak permohonan pembatalan defendan-defendan; dan sama ada terdapat merit dalam kes plaintif-plaintif dan bahawa tindakan itu tidak remeh, menyusahkan atau menyalah guna proses Mahkamah Tinggi.

Diputuskan, menolak kedua-dua rayuan dengan kos:

(1) Adalah undang-undang tetap bahawa mahkamah yang mendengar permohonan pembatalan hanya membatalkan writ dan penyataan tuntutan apabila ia adalah jelas dan nyata bahawa tindakan itu tidak

boleh dikekalkan dan boleh dibatalkan menurut A 18 k 19(1) KMT di bawah pelbagai alasan yang dikemukakan di bawah cabang (a), (b), (c), dan (d) (lihat perenggan 16).

(2) Ini bukan kes yang sesuai dan wajar untuk pliding-pliding plaintif-plaintif dibatalkan di bawah A 18 k 19(1) KMT. Fakta bahawa Mahkamah Persekutuan telah membenarkan rayuan awal plaintif-plaintif terhadap keputuan Mahkamah Rayuan yang mana Mahkamah Tinggi tidak patut membatalkan tuntutan plaintif-plaintif berdasarkan bantahan-bantahan awal defendan, adalah petunjuk jelas bahawa terdapat isu-isu yang perlu dibicarakan di hadapan Mahkamah Tinggi yang mewajarkan perbicaraan (lihat perenggan 17).

(3) Isu-isu yang ditimbulkan dalam rayuan ini dan relief yang dipohon tiada kaitan dengan bidang kuasa mahkamah tetapi berkaitan perkara-perkara tentang hak-hak perlembagaan dan *common law* plaintif-plaintif. Sama ada plaintif-plaintif berjaya atau tidak adalah suatu perkara yang perlu dibicarakan oleh hakim bicara yang telah mengambil kira keputusan Mahkamah Rayuan dan juga Mahkamah Persekutuan. Oleh itu, hakim Mahkamah Tinggi adalah betul kerana menolak permohonan-permohonan pembatalan defendan-defendan berdasarkan penemuan beliau bahawa terdapat isu-isu yang perlu dibicarakan dalam tindakan plaintif-plaintif. Penegasan oleh Mahkamah Persekutuan dalam rayuan terdahulu meletakkan kebenaran dan kewajaran keputusan hakim Mahkamah Tinggi itu boleh dipersoalkan lagi. Oleh itu, demi kepentingan keadilan adalah wajar agar semua isu-isu yang ditimbulkan dalam rayuan ini dibicarakan berdasarkan keterangan yang dikemukakan oleh pihak-pihak. Semasa perbicaraan penuh, defendan-defendan masih boleh menimbulkan isu bidang kuasa, yang mana mahkamah perbicaraan perlu memutuskan berdasarkan hujah berhubung perkara itu dengan mengambil kira matrik faktual kes ini (lihat perenggan 17).]

Notes

For cases on pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8062–8077.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (folld)

Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (folld)

Legislation referred to

Federal Constitution arts 5, 8, 161A(5)
Rules of the High Court 1980 O 18 r 19, O 18 r 19(1)
Sabah Land Ordinance 1930 (Cap 68) ss 9, 12, 13, 14, 15, 16, 41, 69

Appeal from: Suit No K22–245 of 2002 (High Court, Kota Kinabalu)

Simon KY Sim (Shim Pang & Co) in Civil Appeal S-03-IM-65–04 of 2012 for the appellant.
Michael Denis Tan (Michael Denis Tan & Co) in Civil Appeal S-03-IM-67–04 of 2012 for the appellants.
Kong Hong Ming (Lee & Kong) in Civil Appeal S-03-IM-67–04 of 2012 for the respondents.
Kong Hong Ming (Lee & Kong) in Civil Appeal S-03-IM-65–04 of 2012 for the respondents.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us filed against the decision of the learned High Court judge sitting at Kota Kinabalu on 21 March 2012 in dismissing the appellants' notice of appeals to the judge in chambers vide encls 87 and 92 against the decision of the deputy registrar. The deputy registrar had on 16 March 2003, dismissed the appellants' summons in chambers to strike out the respondents' writ of summons and statement of claim ('striking out application').

[2] Before the High Court, the appellants in the two appeals were the first, second and third defendants whilst the respondents were the plaintiffs. In this judgment, we will refer to the parties as they were in the High Court.

[3] The two appeals filed by the defendants can be briefly stated as thus:

(a) Appeal No S-03(IM)-65–04 of 2012 was filed by the first defendant at the court below against the decision of the learned High Court judge in dismissing the first defendant's appeal against the decision of the learned deputy registrar in dismissing the first defendant's striking out application; and

(b) Appeal No S-03(IM)-67–04 of 2012 was filed by the second and third defendants at the court below against the decision of the learned High Court judge in dismissing the second and third defendants appeal against the decision of the learned deputy registrar in dismissing the second and third defendants' striking out application.

BACKGROUND OF THE APPEAL

[4] On 11 October 2012, the plaintiffs brought this representative action on their behalf and on the behalf of the native communities whom are the

residents, proprietors, occupiers, holders and claimants of lands ('the said land') vested with native title and/or native customary rights at the Tongod Region seeking 17 declaratory and injunctive reliefs and damages against the defendants.

[5] It is the plaintiffs pleaded case that they are the natives and descendants of the natives indigenous to the State of Sabah from the Dusun communities. Further to the foregoing it is also the plaintiffs pleaded case that they and their ancestors have settled as native communities residing in the Tongod Region for at least five generations even before the formation of colonial North Borneo, the predecessor of the Sabah State Government ('the fifth defendant') and prior to the enactment of the Land Ordinance 1930 and all its preceding proclamation and legislations in land since 1881. The plaintiffs stance is that they and their ancestors have acquired native customary rights since time immemorial over the said land measuring some 8,830 hectares in the Tongod area. It is the plaintiffs' pleaded case that during the period between 1985 and 1999, they by themselves or their predecessors had applied to the Director of Department of Lands and Survey, Sabah ('the fourth defendant') for the respective parcels of land comprised in the said land for the issue of the respective documents of title.

[6] The present dispute arose when the fourth defendant, namely the Director of Lands and Surveys Department approved Hap Seng Consolidated Bhd's ('the first defendant') application for Country Lease in year 1997 and thereafter had alienated to the first defendant the land in the Tongod Region measuring 21,819 acres and in 1999, issued the land title in Country Lease No 095330724. The first defendant together with Asiatic Development Bhd ('the second defendant') cleared the land and planted it with oil palm. On 3 May 2002, the first defendant sold and transferred the land to Tanjung Bahagia Sdn Bhd ('the third defendant').

[7] The plaintiffs contended that the alienation of the said land to the first defendant by the fourth defendant was subject to their accrued native customary rights beneficially belonging to the plaintiffs and their native community. The plaintiffs' claim against the first, second and third defendant was precipitated by the defendants wrongful act of trespassing onto the said land to conduct survey works, extensive site clearing and other earthwork. The plaintiffs' allege that the defendants wrongful act of trespassing on the said land had destroyed and damaged substantial parts of the land which consists of crops, fruit trees, and other forest produce grown thereon.

[8] The plaintiffs' claim against the fourth and the fifth defendants was that the alienation and issuance of a country lease for the said land to the first defendant was wrongful and/or unconstitutional and/or in breach of their

fiduciary duty. The plaintiffs further claimed that the conduct of the fourth and fifth defendant in taking the said land offends arts 8 and 5 of the Federal Constitution in that there is discrimination in terms of process and compensation as between the acquisition of the native customary land and deprivation of the natives livelihood. Further and in the alternative, the plaintiffs also claim that the alienation and issuance of the country lease was unconstitutional in that it violates art 161A(5) of the Federal Constitution with regard to the special position of natives in the State of Sabah.

[9] After the close of pleadings, on 11 February 2002, the first defendant applied vide summons in chambers in encl 48 to strike out the plaintiffs' writ of summons and statement of claim under O 18 r 19(1) of the Rules of the High Court 1980 ('RHC'). The second and third defendants followed suit by filing a similar application on 26 February 2003 vide encl 58 to strike out the plaintiffs' writ of summons and statement of claim under O 18 r 19(1) of the RHC. In applying to strike out the plaintiff's claim the first, second and third defendants bone of contention was that the High Court has no original jurisdiction to hear the plaintiffs' claim as the dispute over the alienation of the said land is still pending before the assistant collector of land revenue ('ACLR').

[10] On 13 March 2003, the deputy registrar dismissed both encls 48 and 58. Dissatisfied with the decision of the deputy registrar, the first, second and third defendants appealed to the judge in chambers in encls 87 and 92 respectively.

[11] Whilst the appeals were pending, the learned judicial commissioner ('JC') heard the first defendant as well as the second and third defendants' preliminary objection to the plaintiffs' application for injunction vide encl 18 filed on 30 October 2002. The learned JC allowed the preliminary objection premised on the ground that the High Court had no jurisdiction to hear the plaintiffs' claim for native customary rights pursuant to ss 14, 16, 41, and 69 of the Sabah Land Ordinance. As a result the plaintiffs' claim was accordingly dismissed on 20 June 2008.

[12] Aggrieved by the aforesaid decision the plaintiffs appealed to the Court of Appeal. On 9 June 2011, the appeal was dismissed. However, on 25 July 2011, the plaintiffs were successful in obtaining leave to appeal to the Federal Court, which approved four leave questions. Subsequently on 24 November 2011, the Federal Court allowed the plaintiffs' appeal and directed the High Court to hear encls 87 and 92 ie the two appeals by the first, second and third defendants against the decision of the deputy registrar in refusing to strike out the plaintiffs' writ and statement of claim. In consequence, the plaintiffs' suit was reinstated and remitted back to the High Court.

[13] Enclosures 87 and 92 were heard before the High Court judge as ordered by the Federal Court. On 21 March 2012, Abdul Rahman Sebli J heard encls 48 and 58 and dismissed the two appeals with costs. In so doing, His Lordship held, inter alia, that:

(a) the collector had no jurisdiction to hear the plaintiffs' claim because the collector's jurisdiction is limited to determining NCR over unalienated land and not in respect of land which has already been alienated as in the present case;

(b) there is at least one serious triable issue in the plaintiffs' claim, namely, whether the fourth and fifth defendants had wrongfully and unconstitutionally alienated the land to the first defendant in disregard of the acquired or accrued NCR of the plaintiffs in the land; and

(c) the plaintiffs' claim in challenging the fourth and fifth defendants decision in alienating the land to the first defendant falls squarely within the jurisdiction of the High Court.

SUBMISSIONS

[14] The defendants forcefully argued that the High Court does not have original jurisdiction to hear claims for NCR. In support of this proposition learned counsel relied on s 69 of the Land Code which provides that claims to land based on customary tenure shall be decided by the collector. Notwithstanding this, s 41 of the Land Code clearly spells out that no court shall exercise jurisdiction in respect of which jurisdiction is given to the collector. The procedure and claims for NCR has been aptly set forth in the Ordinance particularly under ss 9, 13–16 and 41. Learned counsel highlighted that procedurally s 41 provides that an appeal from the collector will be heard by the director and then by the High Court. By reason of the matters aforesaid, learned counsel for the defendants submitted that the plaintiffs by filing this suit whilst still waiting for the ACLR to conduct an inquiry had subjected themselves to multiplicity of proceedings as the ACLR and the High Court may arrive at different and conflicting decisions. There is multiplicity of proceedings involved as the plaintiffs even before having their rights determined before the ACLR had proceeded to ventilate their claims before the High Court. In this regard learned counsel submitted that the ACLR is the in the best possible position to determine such NCR claims. If the ACLR makes a decision which is not satisfactory, there is always procedure for appeal which the plaintiffs can avail themselves to as laid down under the law.

[15] The plaintiffs in resisting the defendants striking out applications submitted that the High Court has jurisdiction as under s 14 of the Sabah Land

Ordinance as the collector has jurisdiction only to determine NCR claims over state land in situations envisaged under ss 12 to 14 of the Ordinance and not over alienated land such as the land in dispute in this action. As such learned counsel for the plaintiff submitted that the High Court has jurisdiction to review the decision of the director as the director went outside the jurisdiction conferred on him when he alienated the said land to the first defendant. The plaintiffs stance is that the High Court has jurisdiction to review the decision of the director in the exercise of his discretion if it was wrong in law, arbitrary, unreasonable or was exercised in bad faith or was not exercised according to rule of reason and justice.

ISSUES AND FINDINGS

[16] As evident from the submissions of the parties in this appeal, we have to consider this appeal on two broad grounds — one pertains to whether the learned judge was right in refusing the defendants striking out application, and the other whether there are merits in the plaintiffs' case and that the action was not frivolous, vexatious or an abuse of the process of the High Court. In other words, is this a case where the plaintiffs' claim should be struck out without giving them an opportunity to have their day in court. It is trite law that the court hearing a striking out application will only strike out a writ and statement of claim when it is plainly obvious that the action cannot be sustained and liable to be struck out pursuant to O 18 r 19(1) of the RHC 1980 under the various grounds set forth under limb (a)–(d). The test for striking out under any of the four limbs in O 18 r 19(1) of the RHC 1980 is well settled, and has been laid down in cases such as *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 and *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16.

[17] We have anxiously deliberated on the issues at hand and we are of the view that based on the facts and circumstances, this is not a proper and fit case for the plaintiffs' writ and statement of claim to be struck out under O 18 r 19(1) of the RHC. The fact that the Federal Court on 24 November 2012, had allowed the plaintiffs earlier appeal against the decision of the Court of Appeal that the High Court should not have struck out the plaintiffs' claim based on the preliminary objections of defendant, was a clear indication that there are triable issues before the High Court which warrant a trial. We are of the view that the issues raised in this appeal and the relief sought thereof does not relate to jurisdiction of the court but concerns matters relating to the plaintiffs' constitutional rights and common law rights. Whether the plaintiffs succeeds or not is a matter to be tried by the trial judge who has to take into consideration of the decision of the Court of Appeal as well as the Federal Court. As such we find that the learned High Court judge was right in refusing

the defendants striking out applications premised on his findings that there are triable issues in the plaintiffs' action. The affirmation by the Federal Court in the earlier appeal puts the correctness and propriety of the learned High Court judge's decision beyond question. Thus in the interest of justice it is only proper that all the issues raised in this appeal should be ventilated at the trial proper based on the evidence adduced by the parties. At the full trial the defendants can still raise the issue of jurisdiction, which the trial court would have to decide on the submission on the point having regard to the factual matrix of this case. Further to the foregoing, we do take cognisance of the fact the since December 2012–March 2013, the High Court has commenced the trial of this action.

[18] For the above stated reasons we dismissed both the appeals with costs.

Appeals dismissed with costs.

Reported by Afiq Mohamad Noor